No. 01-618

In the Supreme Court of the United States

ERIC ELDRED, ET AL., PETITIONERS

v.

JOHN D. ASHCROFT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the 20-year extension of the terms of all copyrights, set forth in the Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112 Stat. 2827, violates the Copyright Clause of the Constitution.

2. Whether the CTEA's 20-year extension of the terms of all copyrights violates the First Amendment.

3. Whether a court of appeals may decline to consider arguments raised by an amicus that differ from the arguments raised by the party that the amicus seeks to support.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 239 F.2d 372. The opinion of the court of appeals (Pet. App. 24a-33a) on denial of rehearing and rehearing en banc is reported at 255 F.3d 849. The Memorandum and Order of the district court (Pet. App. 34a-39a) is reported at 74 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 2001, and a petition for rehearing was denied on July 13, 2001. The petition for a writ of certiorari was filed on October 11, 2001. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Copyright Clause of the Constitution confers upon Congress the "power * * * To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. Art. I, § 8, Cl. 8. Beginning in 1790, see Act of May 31, 1790, ch. 15, 1 Stat. 124, Congress has enacted a number of copyright statutes pursuant to that authority. The 1790 Copyright Act established a copyright term of 14 years and applied it both to newly created works and to subsisting works protected under the copyright laws of the various States. Act of May 31, 1790, § 1. Congress extended the term of copyright protection for new and subsisting copyrighted works again in 1831 and 1909. Act of Feb. 3, 1831, §§ 1-3, 4 Stat. 436-437; Act of Mar. 4, 1909, § 24, 35 Stat. 1075-1088. Currently, most copyright claims are governed by the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, codified as amended at 17 U.S.C. 101 *et seq.* As originally enacted, the Copyright Act of 1976 accorded the exclusive right to publish and reproduce an original work to the author of that work during the author's life plus 50 years. See 17 U.S.C. 302(a) (1978).

In 1998, Congress enacted the Sonny Bono Copyright Term Extension Act (CTEA or Act), Pub. L. No. 105-298, 112 Stat. 2827, bringing United States copyright law into conformity with the copyright laws of the European Union. See Pet. App. 13a. Among other things, the CTEA extends the terms of copyrights for 20 years. See CTEA, § 102(b) and (d), 112 Stat. 2827 (amending 17 U.S.C. 302, 304). Thus, an additional term of 20 years is added to the duration of all existing copyrights (*i.e.*, for all original works that, at the time of

the Act's effective date, had not yet fallen into the public domain). CTEA § 102(d), 112 Stat. 2827 (amending 17 U.S.C. 304). The Act also provides that any future copyrights will have a term of the life of the author plus 70 years. CTEA, § 102(b), 112 Stat. 2827 (amending 17 U.S.C. 302).

2. Petitioners brought this action in the United States District Court for the District of Columbia to challenge, among other things, the constitutionality of the CTEA's 20-year extension of existing copyrights. Specifically, they alleged that the extension violates the First Amendment and the Copyright Clause of the Constitution.

The parties filed cross-motions for judgment on the pleadings. By Memorandum and Order filed on October 28, 1999 (Pet. App. 34a-39a), the district court granted respondent's motion and denied petitioners'. The court first rejected petitioners' First Amendment claim. "The District of Columbia Circuit," the district court held, "has ruled definitively that there are no First Amendment rights to use the copyrighted works of others." *Id.* at 37a (citing *United Video, Inc.* v. *FCC*, 890 F.2d 1173, 1191 (D.C. Cir. 1989), and *Harper & Row, Publishers, Inc.* v. *Nation Enterprs.*, 471 U.S. 539, 556 (1985)).

The court also held that Congress did not exceed its powers under the Copyright Clause of the Constitution by extending the terms of existing copyrights. The court stated that the duration requirement of that clause—which requires that copyrights persist only for "[l]imited [t]imes"—is "subject to discretion of Congress." Pet. App. 37a (citing *Pennock & Sellers* v. *Dialogue*, 27 U.S. (2 Pet.) 1, 16-17 (1829)). Congress, the district court further held, "has authority to enact retrospective laws under the copyright clause." *Id.* at

37a (citing *McClurg* v. *Kingsland*, 42 U.S. (1 How.) 202, 206 (1843)).[1]

3. Petitioners appealed, and the court of appeals affirmed. Pet. App. 1a-16a. The court unanimously rejected petitioners' First Amendment claim, but one member of the panel dissented with respect to the claim that Congress had exceeded its powers under the Copyright Clause.

a. On the First Amendment claim, the court of appeals first held that petitioners have standing to challenge the CTEA's application both to subsisting copyrights and to future copyrights. Pet. App. 4a-5a. The court disagreed with the government's contention that petitioners lack standing to raise the latter challenge. Petitioners "benefit from works in the public domain and are deprived of that benefit so long as such works are under copyright," the court stated. That alleged deprivation, the court of appeals continued, is threatened as much "for works not yet created as for extant works on which the copyrights are about to expire." *Id.* at 5a.

On the merits of the First Amendment claim, the court held that this Court's decision in *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985), and the D.C. Circuit's decision in *United Video, Inc.* v. *FCC*, 890 F.2d 1173 (1989), "stand as insuperable bars to [petitioners'] first amendment theory." Pet. App. 5a. Copyright, the court explained, merely gives

[1] The district court also rejected petitioners' argument that the extension violates the "to Authors" term of the Copyright Clause, and their claim that it violates the public trust doctrine. Petitioners did not renew those two distinct legal arguments in the court of appeals; nor have they attempted to do so in their petition to this Court.

the author an exclusive right in the form of expression; it does not give the author a monopoly on the idea or fact being expressed. See *id.* at 5a-6a. Accordingly, the court held, copyright laws do not infringe freedom of speech. *Id.* at 6a. Indeed, it continued, this Court had so recognized in *Harper & Row*. Pet. App. 6a (quoting 471 U.S. at 556).

The court of appeals rejected, as "wholly illusory," petitioners' attempt to distinguish *Harper & Row* and *United Video*. Pet. App. 7a. It is true, the court pointed out, that the litigants in those cases "demand-[ed] a right to use otherwise legitimately copyrighted material," *id.* at 6a, whereas petitioners in this case bring a "First Amendment challenge[] to the constitutionality of the statute granting a [copy]right in the first instance.'" *Ibid.* The court of appeals concluded, however, that the purported distinction did not make a logical difference. The relevant question for First Amendment purposes is "whether the party has a first amendment interest in a copyrighted work." *Id.* at 7a. Answering that question in the negative, the court concluded that petitioners "lack any cognizable first amendment right to exploit the copyrighted works of others." *Id.* at 8a.

b. The court of appeals also rejected petitioners' claim that the CTEA, by extending the duration of already existing copyrights, exceeds Congress's powers under the Copyright Clause. Petitioners had argued that Congress "cannot extend an extant copyright," because a pre-existing "copyrighted work already exists and therefore lacks originality." Pet. App. 8a. The court responded by pointing out that a "work with a subsisting copyright has already satisfied the requirement of originality, and need not do so anew for its copyright to persist." *Ibid.* Petitioners, the court

further noted, "point to no case or commentary * * * that calls into question the distinction between a new grant of copyright—as to which originality is an issue—and the extension of an existing grant." *Id.* at 9a.

c. The court of appeals also rejected petitioners' "contention that the CTEA violates the constitutional requirement that copyrights endure only for 'limited Times.'" Pet. App. 10a. Petitioners argued, in effect, that increases in the duration of an already existing copyright could not be justified under the Copyright Clause, because such increases would not "promote the Progress of Science and useful Arts." Petitioners' idea was that "the phrase 'limited Times' should be interpreted not literally but rather as reaching only as far as is justified by the preambular statement of purpose"—*i.e.*, that "if '50 years are enough to promote . . . Progress,' then a grant of 70 years is unconstitutional." *Ibid.*

That argument, the court of appeals held, was foreclosed by *Schnapper* v. *Foley*, 667 F.2d 102 (D.C. Cir. 1981), cert. denied, 455 U.S. 948 (1982). In that case, the court of appeals "rejected the argument 'that the introductory language of the Copyright Clause constitutes a limit on congressional power.'" Pet. App. 10a (quoting *Schnapper*, 667 F.2d at 112). In this case, the court observed, petitioners did not ask that *Schnapper* be overturned. Instead, petitioners had urged the court of appeals to circumvent *Schnapper*'s holding by interpreting the term "limited Times" to take its meaning (and incorporate temporal limits) from the preamble. The court rejected that argument as unpersuasive. "[O]ne cannot concede that the preamble 'is not a substantive limit' and yet maintain that it limits the permissible duration of a copyright more strictly than does the textual requirement that it be for a

'limited Time.'" *Id.* at 10a-11a. Further, although petitioners relied on *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U.S. 340 (1991), and *Trade-Mark Cases*, 100 U.S. 82 (1879), the court of appeals concluded that neither of those cases requires that the phrase "limited Times" be read as taking its substance from the preamble's statement of purpose. Instead, the court held, those cases turn on the meaning of the words "Authors" and "Inventions"—which imply an element of originality—and not on any independent effect of the Copyright Clause's preamble. Pet. App. 10a-11a.

d. The court declined to entertain or adopt an argument that had been raised solely by an amicus. Pet. App. 11a-12a. According to the amicus, *Schnapper* does not preclude courts from requiring that Copyright Clause legislation, viewed as a whole, promote science and the useful arts. Instead, the amicus argued, *Schnapper* merely bars courts from requiring that each case-specific application of the copyright power—the award and protection of copyrights in individual cases—promote science and the useful arts. Because that argument had been raised only by an amicus, and because it had not been adopted by any of the parties, the court concluded that it need not address it. *Id.* at 11a-12a. The decision not to address amicus's argument, the court further held, was supported by two prudential considerations. First, federal courts generally should not seek out constitutional issues not before them. *Id.* at 11a. Second, the court observed, the parties' "conspicuous[]" failure to adopt amicus's argument had prevented the government from being "alerted to any need to argue this point." *Ibid.* Because the government in fact did not argue the point,

the court deemed it inappropriate to resolve the issue without the benefit of full adversary presentation. *Ibid.*

The court also stated that, if it were required to address amicus's legal argument, it might well reject it. Even if the court were to agree that the Copyright Clause's preamble—"To promote the Progress of Science and useful Arts"—imposes a judicially cognizable limitation on Congress's power, the court "might well hold that the application of the CTEA to subsisting copyrights is 'plainly adapted' and 'appropriate' to 'promot[ing] progress.'" Pet. App. 12a (citing *Ladd* v. *Law & Techn. Press*, 762 F.2d 809, 812 (9th Cir. 1985), cert. denied, 475 U.S. 1045 (1986)). The court observed: "Congress found that extending the duration of copyrights on existing works would, among other things, give copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration." *Ibid.* (citing S. Rep. No. 315, 104th Cong. 2nd Sess. 12 (1996)).

e. Finally, the court found that the CTEA's constitutionality is reinforced by three further considerations. First, the CTEA "matches United States copyrights to the terms of copyrights granted by the European Union." Pet. App. 13a. "[I]n an era of multinational publishers and instantaneous electronic transmission, harmonization in this regard has obvious practical benefits for the exploitation of copyrights." *Ibid.*

Second, the claim that Congress lacks authority to extend the term of copyrights in existing works is refuted by historical practice. The First Congress "made the Copyright Act of 1790 applicable to subsisting copyrights arising under the copyright laws of the several states." Pet. App. 13a. The construction of the Constitution "'by [those] contemporary with its

formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed [for this long], it is almost conclusive.'" *Id.* at 14a (quoting *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53, 57 (1884)). Third, this Court had made it "plain" that Congress has the power "to amplify the terms of an existing patent." *Id.* at 14a-15a (citing *McClurg* v. *Kingsland*, 42 U.S. (1 How.) 202, 206 (1843)). There is no reason, the court of appeals concluded, why Congress would lack similar power with respect to existing copyrights. *Id.* at 15a.

f. Judge Sentelle dissented in part. Although he agreed that Congress has authority to extend the term of copyright protection for future works, he concluded that Congress had exceeded its power under the Copyright Clause by extending the copyright term of *existing* works. Pet. App. 16a-23a. He maintained that the "concept of 'outer limits' to enumerated powers applies not only to the Commerce Clause but to *all* the enumerated powers, including the Copyright Clause." *Id.* at 17a (quoting *United States* v. *Lopez*, 514 U.S. 549, 552 (1995)). He stated that the Copyright Clause "is not an open grant of power to secure exclusive rights," but rather "a grant of a power to promote progress," by granting exclusive rights only for "limited times." *Id.* at 18a. In his view, "[e]xtending existing copyrights is not promoting useful arts, nor is it securing exclusivity for a limited time." *Id.* at 19a.

Accepting the arguments of an amicus, Judge Sentelle also expressed the view that *Schnapper* did not foreclose the court from looking to the language of the preamble to the Copyright Clause to determine the scope of the "limited Times" requirement. Pet. App.

20a. Instead, he read *Schnapper* as barring courts from requiring that each application of the Copyright Clause, in individual cases, actually have the effect of promoting science or art. Although the argument had not been raised by a party—it was raised only by an amicus—Judge Sentelle thought it proper for the court to consider the argument because it concerned an issue, the constitutionality of the CTEA, that was before the court. *Id.* at 21a-23a.

4. Petitioners filed a petition for rehearing en banc, which the court denied. Pet. App. 27a.

The panel majority issued an opinion on rehearing, reiterating its view that the contentions of petitioners' amicus were not properly before it, Pet. App. 24a-27a, and that it would be "'particularly inappropriate' in this case to reach" those contentions, *id.* at 25a. The majority stressed that petitioners had declined to adopt the position of its amicus. Under such circumstances, the court explained, it was proper to follow *New Jersey* v. *New York*, 523 U.S. 767, 781 n.3 (1998), and to refuse to address the argument. The majority also explained that its decision not to reach amicus's argument was supported by the principle of constitutional avoidance. The amicus's position "poses an additional constitutional question," the court explained, and therefore is "subject to the 'rule of avoidance.'" Pet. App. 26a (citing *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)). Furthermore, the court continued, "because the plaintiffs-appellants did not take the same tack as the amicus, the Government did not on brief address the district court's interpretation of" *Schnapper*. Pet. App. 26a.

Finally, the court stated that, "even if we considered the amicus's position we would not reach a different result in this case." Pet. App. 26a. The court explained

that, even if one assumed that "the preamble limits the power of Congress, the CTEA still passes muster under the 'necessary and proper review' applicable to the Congress's exercise of a power enumerated in Article I." *Id.* at 26a-27a (citing 239 F.3d at 378 (Pet. App. 12a)). "Congress found that extending the duration of copyrights on existing works would, among other things, give copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration." *Id.* at 27a (citing 239 F.3d at 378 (Pet. App. 12a)).[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Petitioners cite no decision of any court holding that Congress cannot, consistent with the Copyright Clause, enact legislation that extends the term of existing copyrights. They cite no decision of any court striking down an extension of copyright terms on First Amendment grounds. And they cite no decision of any other court addressing, much less rejecting, the validity of the Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112

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[2] Judge Sentelle (joined by Judge Tatel) filed a statement dissenting from the denial of rehearing en banc. Pet. App. 28a-33a. Judge Sentelle stated that the court's "opinion in this case effectively eliminates any role for *amicus curiae* in the practice of this circuit, when it holds that an argument raised by an *amicus* may not be considered by the Court." *Id.* at 28a. On the merits, Judge Sentelle reiterated his view that Congress lacks authority under the Copyright Clause to extend the copyright term for subsisting works. "Once a work is published," he stated, "extending the copyright term does absolutely nothing to induce further creative activity by the author." *Id.* at 32a-33a.

Stat. 2827. Accordingly, further review is not warranted.

1. Petitioners argue (Pet. 12-16) that the court of appeals' decision, insofar as it upholds Congress's power to extend the duration of existing copyrights, conflicts with decisions of this Court and with other courts of appeals. The asserted conflicts, however, do not exist. The issues on which petitioners identify conflicts are not implicated by this case. And the primary issue on which petitioners claim conflict is largely academic in this case, because the court of appeals' judgment is supported by an alternative holding.

a. Petitioners first claim that the decision below is inconsistent with *Graham* v. *John Deere Co.*, 383 U.S. 1 (1966), *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 499 U.S. 340 (1991), and *Trade-Mark Cases*, 100 U.S. 82 (1879). None of those cases, however, addresses Congress's power to extend the term of an existing copyright. Nor do any of them address the constitutionality of the CTEA.

Nonetheless, petitioners claim that *Graham* establishes "that it would be beyond Congress's constitutional power to grant a patent [or a copyright] to a work in the public domain." Pet. 12. Even if *Graham* establishes that proposition, it has nothing to do with this case. Congress did not, by enacting the CTEA, reinstate copyright protection for works that had already entered the public domain. Instead, it extended the copyright protection accorded to copyrighted works that had not yet entered the public domain. As the D.C. Circuit stated, "[h]ere we ask not whether any work is copyrightable—indeed, the relevant works are already copyrighted—but only whether a copyright may by statute be continued in force beyond the renewal term specified by law when the

copyright was first granted." Pet. App. 9a. The court of appeals answered that question in the affirmative, and its answer is in no way inconsistent with *Graham*.

Petitioners' reliance upon *Feist* and *Trade-Mark Cases* is misplaced for the same reason. The principle of "originality" mandated by those decisions is not violated here. In the CTEA, Congress merely extended the term of properly copyrighted "original" works—works that had already met the requirement of originality in qualifying for protection in the first instance. Thus, this is not a case in which Congress has sought to protect works that lack originality. It is a case in which Congress has extended the term of protection for works that are concededly original, and were accorded copyright protection in the first instance precisely because they are original.

Unable to point to a conflict between the decision below and a holding of this Court, petitioners seem to argue that this Court's cases must be read as recognizing, *sub silentio*, that the preamble to the Copyright Clause—"To promote the Progress of Science and useful Arts"—creates a judicially manageable and enforceable limitation on Congress's copyright powers. That is true, they argue, because the preamble is the "only" possible source of the "originality" requirement this Court has recognized, and the only conceivable source of the asserted prohibition against removing works from the public domain. Pet. 12-13. A purported conflict between a decision of a court of appeals and hypothetical *sub silentio* reasoning that petitioners *attribute* to this Court is not a sound basis for further review.

Petitioners, in any event, are incorrect in claiming that the "originality" requirement and the alleged prohibition on Congress's removal of works from the public domain necessarily stem from the Copyright Clause's

preamble. To the extent the Copyright Clause itself imposes those limits, they would more logically stem from the *body* of the Copyright Clause, which authorizes Congress to grant to "*Authors* and *Inventors*" the "exclusive Right to *their* respective Writings and Discoveries." U.S. Const. Art. I, § 8, Cl. 8 (emphases added). The use of the possessive form—"their" writings—together with the words "Authors" and "Inventors" might be thought to preclude copyright protection for works that are not original or that are in the public domain; in such cases, the individuals seeking protection might not be considered the "authors," and the work might not be considered "theirs." Cf. *Frantz Mfg. Co.* v. *Phenix Mfg. Co.*, 457 F.2d 314, 327 n.48 (7th Cir. 1972) ("An author's 'Writing' or an inventor's 'Discovery' can, in the constitutional sense, only extend to that which is his own. It may not be broadened to include matters within the public domain."). Because Congress in the CTEA extended copyright protection only for *original* works that are *not* already in the public domain, the origin or scope of the requirement that works be "original," or of any prohibition on removing works from the public domain, is not at issue here.

The question here is whether Congress can extend the duration of an already subsisting copyright. Nothing in this Court's cases precludes Congress from enacting a statute that does so. Nor does any decision of this Court hold that the preamble to the Copyright Clause creates judicially manageable limits on Congress's authority in that regard. And historical practice amply supports the sensible view that Congress may extend the term of existing copyrights when it extends the term of copyrights for future works. Pet. App. 13a-14a & n.1 (noting that Congress extended the terms of

subsisting copyrights in 1790, 1831, and 1909); p. 2, *supra*. Indeed, as the court of appeals explained—and petitioners nowhere dispute—the First Congress "made the Copyright Act of 1790 applicable to subsisting copyrights arising under the copyright laws of the several states." Pet. App. 13a-14a (citing Act of May 31, 1790, §§ 1, 3, 1 Stat. 124-125). The construction of the Constitution by those "contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed [for this long], it is almost conclusive.'" *Id.* at 14a (quoting *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53, 57 (1884)). Petitioners nowhere explain why that practice should not be considered conclusive here.

b. Petitioners also argue (Pet. 14-15) that the court of appeals' decision on the scope of Congress's Copyright Clause powers conflicts with authority from other circuits. That claim of conflict, which principally relies on *Mitchell Brothers Film Group* v. *Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979), cert. denied, 445 U.S. 917 (1980), is wholly without merit.

As an initial matter, *Mitchell Brothers* did not involve a constitutional challenge to a statutory extension of the term of subsisting copyrights. Instead, it addressed the unrelated question of whether an obscene work may be copyrighted. The court answered that question in the affirmative, declaring that copyright statutes need not promote "progress" in science and the arts in every application. Far from creating a conflict with the holding or rationale of *Mitchell Brothers*, the D.C. Circuit in *Schnapper* v. *Foley*, 667 F.2d 102 (D.C. Cir. 1981), cert. denied, 445 U.S. 948 (1982), specifically endorsed the Fifth Circuit's statement of the proper

scope of judicial review in a Copyright Clause challenge—a "necessary and proper" standard that does "not require that each copyrighted work be shown to promote the useful arts * * *." *Id.* at 112 (quoting *Mitchell Bros.*, 604 F.2d at 860). In this case, the D.C. Circuit merely followed its *Schnapper* ruling. Pet. App. 10a. Petitioners do not explain how a decision following *Schnapper*, which follows *Mitchell Brothers*, can have created a conflict with *Mitchell Brothers*.

Nor can one say that, under *Mitchell Brothers*, the Fifth Circuit would reach a different result from that reached by the D.C. Circuit here. To the contrary, far from contradicting the result reached by the court of appeals, *Mitchell Brothers*' broad view of Congress's powers under the Copyright Clause supports the D.C. Circuit's decision. The *Mitchell Brothers* court indicated that "it is up to Congress to decide upon the means by which the constitutional command will best be effectuated," and that Congress's copyright enactments are at most subjected to review under "the lenient" necessary-and-proper standard. 604 F.2d at 860. Applying that very standard to the CTEA, the court of appeals in this case concluded that the CTEA is necessary and proper to Congress's exercise of its enumerated Copyright Clause powers. Pet. App. 26a-27a; pp. 18-19, *infra*.

The remaining court of appeals' decisions cited by petitioners are even further afield. Pet. 15-16. The cases invoked by petitioners do not involve constitutional challenges to copyright statutes, but rather issues such as interpretation of the scope of a claimed exclusive right under patent law (*Frantz Mfg. Co.* v. *Phenix Mfg. Co.*, 457 F.2d 314 (7th Cir. 1972)); the scope of joint authorship under the Copyright Act (*Erickson* v. *Trinity Theatre*, 13 F.3d 1061 (7th Cir. 1994); *Aalmu-*

hammed v. *Lee*, 202 F.3d 1227 (9th Cir. 2000)); interpretation of the scope of "fair use" (*Rosemont Enter. Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966)); and the scope of a provision of the Copyright Act governing contributions to collective works (*Greenberg* v. *National Geographic Soc'y*, 244 F.3d 1267 (11th Cir.), cert. denied, 122 S. Ct. 347 (2001)). None of those statutory interpretation cases stands for the proposition that the Constitution requires a rigorous judicial inquiry into whether a particular congressional enactment under the Copyright Clause promotes the useful arts.

Likewise, those decisions—which involved neither a copyright extension statute nor the "limited Times" language of the Copyright Clause—neither compel nor support the conclusion that the Copyright Clause's preamble controls the meaning of the "limited Times" provision. And they certainly do not indicate that those courts would reach a different result if presented with the challenge to the CTEA that petitioners raise here. In sum, those decisions do not conflict with the D.C. Circuit's ruling, and provide no basis for further review of the decision below.[3]

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[3] Petitioners also predicate the supposed need for review on the hyperbolic claim that the decision below will permit Congress to extend the duration of copyrights indefinitely, one enactment at a time, and thereby circumvent the limited duration requirement. Pet. 9. As the court of appeals recognized, however, that "clearly is not the situation" here. Pet. App. 13a. Instead, the "temporal thrust of the CTEA is a good deal more modest: The Act matches United States copyrights to the terms of copyrights granted by the European Union." *Ibid.* That goal is unquestionably a permissible one. Indeed, that was precisely Congress's goal when it extended the duration of copyrights in 1831. See 7 Cong. Deb. App. CXIX (1830) (1831 change "to place authors in this country more nearly on an equality with authors in other countries.").

c. Petitioners, moreover, ignore the fact that the court of appeals' alternative holding, which independently supports the judgment below, would render this Court's resolution of the alleged circuit conflicts wholly advisory. The court of appeals held that, even if it were to agree that the phrase "To promote Progress of Science and the useful Arts" in the preamble acts as a substantive limit on Congress's authority under the Copyright Clause, it "would not reach a different result in this case." Pet. App. 26a. See also *id* at 12a-13a. Instead, the court concluded, the CTEA would still be within Congress's authority, because the CTEA is necessary and proper to Congress's exercise of its enumerated Copyright Clause powers. *Id.* at 26a-27a. As the court of appeals explained, "Congress found that extending the duration of copyrights on existing works would, among other things, give copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration. * * * Preserving access to works that would otherwise disappear—not enter the public domain but disappear—'promotes Progress' as surely as does stimulating the creation of new works." *Id.* at 27a (some internal quotation marks omitted). See also *id.* at 12a-13a. Nothing in the Constitution, in any event, compels Congress to establish a dual-system of copyright under which works created the moment before Congress enacts copyright term extension legislation must have a shorter term than works created the moment after. Rather, Congress was entitled to establish a system of copyright that treats authors in a more even-handed fashion.

In view of the court of appeals' alternative holding, the issues on which petitioners claim conflict are largely academic. Even if this Court were to hold that the preamble to the Copyright Clause imposes judicially

manageable limits on the scope of Congress's authority, as petitioners assert, the court of appeals' conclusion that Congress did not exceed its authority—because the CTEA does promote progress in the useful arts—would still stand.[4] Because this Court's resolution of the claimed conflicts would not alter the judgment below, further review would be inappropriate.

2. Petitioners' First Amendment claim fares no better. Petitioners initially contend (Pet. 18-22) that the D.C. Circuit's decision rejecting their First Amendment claim improperly expands this Court's decision in *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985). They are mistaken. In *Harper & Row*, the Court held that the First Amendment did not give a magazine the right to publish excerpts from President Ford's copyrighted memoirs in advance of their authorized publication. Explaining its decision, the Court stated:

> [C]opyright's idea/expression dichotomy "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." 723 F.2d at 203. No author may copyright his ideas or the facts he narrates. 17 U.S.C. § 102(b). See, *e.g.*, *New York Times Co.* v. *United States*, 403 U.S. 713, 726, n. (1971) (Brennan, J., con-

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[4] This case, moreover, would be a particularly inappropriate vehicle for considering the correctness of that holding. Because the case was decided on cross-motions for judgment on the pleadings, the parties have not developed an extensive record regarding the extent to which extending existing copyrights might reasonably be thought to promote progress in the useful arts. The decision below, moreover, is the first to have considered that question.

> curring) (Copyright laws are not restrictions on freedom of speech as copyright protects only form of expression and not the ideas expressed).

471 U.S. at 556. Petitioners offer no reason why (absent viewpoint discrimination not present here) the idea/expression balance does not similarly prevent copyright from infringing their First Amendment rights. Nothing prevents them from using the ideas or facts contained in works protected by the CTEA. Nor do they explain why, to the extent anyone needs to use copyrighted expression, the "fair use" doctrine incorporated into the Copyright Act does not fully vindicate such interests. Indeed, this Court has indicated that it may be permissible to copy protected expression verbatim where "necessary adequately to convey the facts," or where particular expression is "so integral to the idea expressed as to be inseparable from it," *Harper & Row*, 471 U.S. at 563; and the "merger doctrine" similarly instructs that "[w]hen there is essentially only one way to express an idea, the idea and its expression are inseparable and copyright is no bar to copying that expression." *Yankee Candle Co., Inc.* v. *Bridgewater Candle Co., LLC*, 259 F.3d 25, 35-36 (1st Cir. 2001); see also *Ets-Hokin* v. *Skyy Spirits, Inc.*, 225 F.3d 168, 1082 (9th Cir. 2000) ("Under the merger doctrine, courts will not protect a copyrighted work from infringement if the idea underlying the copyrighted work can be expressed in only one way, lest there be a monopoly on the underlying idea.").

Instead, petitioners seek to distinguish *Harper & Row*. They argue that *Harper & Row* applies only where a litigant demands a right to use otherwise legitimately copyrighted material, and not to a First Amendment "challenge of the statutes under which

copyrights are established." Pet. 19-21. They cite no cases so holding, and any such distinction is illusory. As the court of appeals noted:

> The relevant question under the First Amendment —regardless whether it arises as a defense in a suit for copyright infringement or in an anticipatory challenge to a statute or regulation—is whether the party has a first amendment interest in a copyrighted work. The works to which the CTEA applies, and in which plaintiffs claim a first amendment interest, are by definition under copyright; that puts the works on the latter half of the "idea/expression dichotomy" and makes them subject to fair use. This obviates further inquiry under the First Amendment.

Pet. App. 7a. Indeed, if petitioners' distinction were accepted, the defendants in *Harper & Row* could have prevailed if they had claimed that the Copyright Act was *invalid* insofar as it purported to create a copyright in the work they appropriated, rather than claiming that they had a First Amendment right to use otherwise copyrighted work materials. Obviously, those alternative ways of framing the same First Amendment argument do not change the pertinent analysis and should not alter the proper result. In either case, the question is whether the litigant has a "cognizable First Amendment right to exploit" the work that Congress has purported to protect. Pet. App. 8a. Here, as in *Harper & Row*, petitioners may freely copy and use the facts and ideas contained in works subject to the CTEA, and may even copy original expression in such works to the extent permitted by the fair use doctrine and related principles. The con-

cerns and values reflected in the First Amendment are therefore fully satisfied.

Petitioners assert that the basis of the court of appeals' rejection of their First Amendment claim was that "there is no First Amendment right to trespass." Pet. 21. Seizing upon the term "trespass," they claim that "the D.C. Circuit's own authority in the context of abortion protester cases shows" the court's error. *Ibid.* Even if one were to assume that an intra-circuit conflict exists, it is well settled that such a conflict furnishes no basis for a grant of certiorari. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, petitioners simply miss the point. To accommodate First Amendment concerns, copyright statutes have long limited protection to the form of expression, and permitted others to use all facts and ideas contained in the copyrighted work. They similarly have permitted others to make "fair use" of even otherwise protected expression. It is the doctrine of fair use, as well as the doctrine "'under which ideas are free but their particular expression can be copyrighted,'" Pet. App. 6a, that ensures that copyright statutes remain largely immune from First Amendment challenges. Nothing in the abortion protest cases cited by petitioners undermines that principle.

Alternatively, petitioners argue that the D.C. Circuit's First Amendment holding conflicts with *CBS Broadcasting, Inc.* v. *Echostar Communications Corp.*, 265 F.3d 1193 (11th Cir. 2001). Pet. 22-24. The short answer is that the Eleventh Circuit, in rejecting a First Amendment challenge to a copyright statute in *CBS Broadcasting*, specifically endorsed the law of the D.C. Circuit in the copyright/First Amendment context, stating that "[t]here is 'no first amendment right to

* * * make commercial use of the copyrighted works of others.'" *CBS Broad.*, 265 F.3d at 1211 (quoting *United Video, Inc.* v. *FCC*, 890 F.2d 1173, 1190-91 (D.C. Cir. 1989)). Petitioners' claim of conflict thus is without merit.

3. Finally, in a footnote attached to the conclusion section of the petition, petitioners argue that amici have a right to inject additional arguments into a case, even if those arguments are not adopted by the parties. Pet. 26 n.13. This purely procedural issue, presented in a footnote, does not independently warrant the Court's review. Whether or not to consider additional arguments presented by amici, where those arguments are not adopted by the parties, is ordinarily entrusted to a court's discretion; while courts may consider such arguments, they may also decline to address them, especially where, as here, prudential reasons support that result. See *New Jersey* v. *New York*, 523 U.S. 767, 781 n.3 (1998) (declining to address an argument that the party has renounced, or renounced the benefit of).

Here, the court of appeals found strong prudential reasons that weighed against considering the arguments of amici, pp. 7-8, 10, *supra*, and any challenge to those case-specific reasons is likely to prove case-specific and of little continuing importance as well. Moreover, in light of the court of appeals' alternative holding—that the court would reach the same result even if it considered and accepted the amicus's legal theory (see Pet. App. 26a-27a)—any question concerning the scope of amicus participation is not properly presented in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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